

## **DEO Subcommittee Proposal Regarding Election Timelines and Vacancies. Meeting August 31, 2007. Item 3.**

The City Attorney's Office has reviewed proposed language from an August 11, 2007 memorandum by James Ingram for a ballot measure that apparently seeks to accomplish two things: first, to provide more reasonable timelines for elections after vacancies occur in office, and second to expressly permit a resigning public official to remain in office until a successor is elected unless the resignation is prompted by some sort of criminality. We provide no suggested language for the subcommittee's consideration at this time, because we suggest the subcommittee consider deferring the first matter for future review, and whether to defer or decline to take action on the second matter.

These subjects also seem largely unrelated to other "Strong Mayor" measures under consideration. If they are to be submitted to the voters, they should be submitted separately from other measures.

This preliminary report should not be construed as an endorsement of this proposed ballot measure, its legal validity, or the propriety of the subcommittee's consideration of the manner in which the position of the City Attorney should be filled.

**Staff suggests the following changes to existing sections in a memo dated August 11, 2007.**

### **"SECTION 12. THE COUNCIL.**

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(h) If a vacancy occurs for any reason in the office of a Council District, the procedures set forth in Charter section 12(h) shall be followed:

(1) If the vacancy occurs for any reason other than a successful recall election, and,

(A) If the vacancy occurs with one (1) year or less remaining in the term, the Council shall appoint a person to fill the vacant seat on the City Council. Any person appointed by the Council to fill a vacant Council District seat shall not be eligible to run for that office for the next succeeding term; or,

(B) If the vacancy occurs with more than one (1) year remaining in the term, the Council shall call a special election to be held within ~~ninety (90)~~**180** days of the vacancy, unless there is a regular municipal or statewide election scheduled to be held within 180 days of the vacancy. If there is a regular municipal or statewide election scheduled to be held within 180 days of the vacancy, the Council may consolidate the special election with that regular election.

(i) If one candidate receives the majority of the votes cast for all candidates in the special election, the candidate receiving the majority of votes cast shall be deemed to be and declared by the Council to be elected to the vacant office.

(ii) If no candidate receives a majority of votes cast in the special election, a special run-off election shall be held within ~~forty nine (49)~~**60** days of the first special election, unless there is a regular municipal or statewide election scheduled to be held within ninety (90) days of the proposed special run-off election date, at which time the City Council may consolidate the special run-off election with that regular

election. The two (2) candidates receiving the highest number of votes cast for the vacant seat in the first special election shall be the only candidates for the vacant Council seat and the names of only those two (2) candidates shall be printed on the ballot for that seat.

(2) If a vacancy occurs by reason of a successful recall election, the Council shall adopt procedures to fill the vacancy.

Whether a person is appointed or elected to fill a vacant Council District seat, whatever the reason for the vacancy, that person shall serve as that District's Councilmember for the remainder of the unexpired term.

For purposes of Charter section 12(h), a vacancy may result from death, resignation, recall, or unexcused absences as described in Charter section 12(i). If a vacancy occurs by reason of a resignation, the date of the vacancy will be the date specified in the written letter of resignation or, if there is no date certain specified in the letter, upon the date of receipt of the letter by the City Clerk; **provided, however, unless the resignation has been made for cause, such as a court finding of criminality on the part of the person resigning, that person may hold office until a successor is appointed or elected.**

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**(I) In the event that the Council must act to fill a vacancy in the office of Mayor or City Attorney, existing by reason of resignation of either officer, the following procedure shall be followed. If the officer has resigned for cause, such as a court finding of criminality, the date of the vacancy will be the date specified in the written letter of resignation or, if there is no date certain specified in the letter, upon the date of receipt of the letter by the City Clerk. If the resignation is not for cause, the Council may permit him or her to serve until a successor has been elected. If the officer does not wish to serve until a successor is elected, then the Council shall either fill the vacancy by appointment or cause an election to be held to fill the vacancy. Any person appointed or elected to fill such vacancy shall serve for the remainder of such unexpired term.**

#### **SECTION 24.MAYOR.**

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In the event of a vacancy occurring in the office of the Mayor, existing by reason of any cause **other than resignation**, the Council shall have authority to fill such vacancy, provided, however, that if the Council shall fail to fill such vacancy by appointment within thirty (30) days after the vacancy, the Council must immediately cause an election to be held to fill such vacancy. Any person appointed to fill such vacancy, shall hold office only until the next regular municipal election, at which date a person shall be elected to serve for the remainder of such unexpired term."

#### **SECTION 40.CITY ATTORNEY.**

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In the event of a vacancy occurring in the office of the City Attorney by reason of any cause **other than resignation**, the Council shall have authority to fill such vacancy, which said authority shall be exercised within thirty (30) days after the vacancy occurs. Any person appointed to fill such vacancy shall hold office until the next regular municipal election, at which time a person shall be elected to serve the unexpired term. Said appointee shall remain in office until a successor is elected and qualified."

## **City Attorney Comments:**

Our recommendation is to defer the first matter to a future charter review committee, or for independent consideration by the City Council's Rules Committee. The subcommittee may wish to defer the second matter or to decline to take action on the subject. The proposed changes address two different issues, and we segregate our comments accordingly.

### **Changing the timelines for elections after vacancies**

Changing the timelines for elections is a complicated matter. Discussions on the topic should necessarily involve the City Clerk as City's chief City election official. Any committee considering changes to the election timeline within the City Charter may want to consider related findings of the City Council's Elections Task Force, which ended a year-long examination of election processes in June, 2007. The Task Force was a Council-appointed committee of citizens, chaired by the City Clerk, which met from April, 2006 to June, 2007. It provided its reports to the City Council's Rules Committee and made them available on line at <http://www.sandiego.gov/electiontaskforce/about/index.shtml#reports>

For example this or another committee considering a timeline change may find the reports related to "mail only" balloting and "instant runoff" elections of particular interest. Recommended implementation of either of those procedures might shift the focus of the discussion and result in charter changes entirely different from those currently under consideration. We recommend the subcommittee defer this issue to the future because of its complicated nature and the lack of an urgent need to address the issue at this time.

If and when the subcommittee does consider this matter we also note that the staff report from August 11, 2007 suggests changes to charter section 24. Section 24 is not currently in effect: it is superceded by section 265(e) during the operative period of Article XV. Any changes to be made should include section 265(e).

### **Remaining in Office after Resignation**

Most people take the serious option of resigning from elective public office only *when* and *because* they have to. These individuals are unlikely to want to stay on in temporary capacity. Only very rarely do resignees provide *any* advance notice.<sup>1</sup>

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<sup>1</sup> When they do provide advance notice, the date of vacancy for the office is the date specified in the resignation letter. The City Council may meet and to call an election, if that is required, before the vacancy date actually occurs. This occurred with the resignation of the City's last Mayor, who provided two and a half months notice. But the time to complete both primary and runoff elections in the most efficient and economical fashion can extend the time to more than 6 months as happened in 2005. The City's new Mayor was sworn in more than seven months after the vacancy was announced, and more than four months after the vacancy in office occurred.

Mr. Ingram was to contact Council President Peters for a better idea of the actual problem to be solved by a Charter change permitting a resigning public official to remain in office until a successor is elected. Awaiting that response, we assume it includes the rare and hypothetical situation in which an elected official submits a resignation letter effective at a date many months in the future. The committee may wish to consider the wisdom of modifying the City's constitution, only to address remote possibilities. In addition, the subcommittee may wish to discuss whether it is good policy to embody in charter language the notion that a person elected to serve the community could submit a resignation at whim, force a special election to be held to fill the position, and in the interim receive City salary and benefits.

This Office also has some preliminary questions the subcommittee may wish to consider regarding the language proposed by staff. Referring to a resignation as one "for cause or not for cause" presupposes that the person resigning is required to give reasons for resignation. They are not. Even if reasons are provided, they may not be candid. Yet, the proposed language leaves it to the resigning individual to elect to remain in office, requiring the City Council to make a determination that the resignation is or is not "for cause" before the Council declares a vacancy in the office. Such a determination would likely delay the declaration of vacancy which is a prerequisite before the Council may legally call an election or open the process for appointments. See, SDMC §§ 27.0702, 27.0703. This in turn might lengthen the election process. In addition, the proposals do not address the process the City Council would use to determine that a resignation is not for cause.

Existing laws seem adequate to address how to fill vacancies after resignations in elective office. In the absence of further clarification, we see no urgent problem that a Charter modification must cure. Accordingly, we suggest the subcommittee consider declining to act on the issue or deferring the matter for future consideration.